PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I. OPINIONS OF THE COURTS BELOW.

The Opinion of the District Court is not reported. It appears at pp. 106 to 115 of the record.

The Opinion of the Circuit Court of Appeals is not reported. The majority opinion appears at pp. 120 to 125 of the record. The dissenting opinion appears at pp. 125 to 132 of the record.

II. JURISDICTION.

1. The decree to be reviewed was dated March 17, 1941.

2. The statute under which jurisdiction is invoked is Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

III. STATEMENT OF THE CASE.

Inasmuch as a statement of the case necessarily has been given under heading "Summary and Short Statement of the Matter Involved" in the Petition at pp. 1-4, a restatement is omitted in the interest of brevity.

IV. SPECIFICATION OF ASSIGNED ERRORS.

The United States Circuit Court of Appeals for the Third Circuit erred:

1. In holding that the libellant was a seaman entitled to maintenance and cure and not under the exclusive jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act of 1927.

2. In holding that the libellant was entitled to recover maintenance and cure for a disability which was not proved to have arisen during employment on a vessel.

3. In holding that the libellant was entitled to recover maintenance and cure from this respondent despite re-employment by others for substantial periods of time at similar maritime work.

4. In holding that the respondent's duty as a vessel owner to supply maintenance and cure continued indefinitely, despite the incurable nature of libellant's disability.

5. In holding that libellant's failure to bring suit within six years was no bar to suit or limit on recovery.

V. SUMMARY OF ARGUMENT.

The petitioner makes the following contentions:

1. Seamen and Shipowners are entitled to know their rights and obligations in cases of this nature.

2. The Circuit Court of Appeals for the Third Circuit erred in awarding maintenance and cure under the circumstances merely because a somewhat similar illness existed at the termination of employment and at the time of trial.

(A) The libellant was a harbor worker under the exclusive jurisdiction of the Longshoremen's & Harbor Workers' Compensation Act of 1927.

(B) The present disability was not incurred in the service of a ship.

(C) The libellant was subsequently similarly employed by others on two occasions for a total of about twenty-nine months.

(D) The liability of the respondent as a vessel owner for maintenance and cure does not continue indefinitely.

(E) Libellant's suit was not brought within six years of termination of employment.

VI. ARGUMENT.

Point No. 1.

Seamen and shipowners are entitled to know their rights and obligations in cases of this nature.

The case of *Calmar SS. Co. v. Taylor,* 303 U. S. 525 (1938), determined that a seaman was entitled to maintenance and cure beyond the termination of the voyage, but that a lump sum award, based upon life expectancy, was not the proper measure of recovery.

This Honorable Court stated in *Calmar v. Taylor* at page 530: "we find no support in the policies which have generated the doctrines for holding that it imposes on the ship owner an indefinitely continuing obligation to furnish medical care to a seaman afflicted with an incurable disease, which manifests itself during his employment, but is not caused by it". The concluding sentence of the opinion of this Court (page 532), has been cited as amendment to the foregoing language: "Cause remanded * * * without prejudice to any later suit by respondent to recover maintenance and cure to which he may then be entitled."

Unfortunately the language of this Court therein has been differently interpreted and variously extended in the short time the case has been on the books until text-writers call the liability imposed "hazy" and judges feel there has been "misconception". Compare the different analyses of the *Calmar* case in the following decisions: *Lindgren v. Shepard SS. Co.,* 108 Fed. 2d, 806 (CCA 2d, 1940); *Delpy v. Crowley Launch & Tugboat Co.,* 99 Fed. 2d, 36 (C. C. A. 9th, 1938).

Judge Clark, after suggesting in his dissent that "his learned brethren misjudge the scope of the decision of the Supreme Court", concluded that the "United States Supreme Court has not yet had occasion to take a position". Judge Clark pleaded that the case be remanded, so that the rights and obligations of seamen and shipowners might be definitely determined.

The argument which Judge Clark makes that the case be remanded is equally effective to urge that this Court review the case upon *certiorari*. But aside from any misreadings of past cases, there are numerous factors here which were not present and did not enter into the decision of *Calmar SS. Co. v. Taylor*. Ignoring all else, we have here a claim for maintenance and cure brought by a harbor worker with an incurable cancer more than six years after the termination of his employment, and after two periods of subsequent re-employment. These are vital factors of difference and should have final adjudication.

It is respectfully submitted that the issues presented are of national significance, concerning every vessel owner from the largest steamship to the lowliest barge in the harbor. Entirely aside from the ultimate recovery in the within case, the maritime industry must know the extent of its liability so that it can plan and insure accordingly. Otherwise multitudinous and vexatious litigation will follow with all the uncertainties involved.

Point No. 2.

The Circuit Court of Appeals erred in awarding maintenance and cure under the circumstances merely because a somewhat similar illness existed at the termination of employment and at the time of trial.

(A) *The libellant was a harbor worker under the exclusive jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act of 1927.*

On March 4, 1927, Congress enacted the United States Longshoremen's and Harbor Workers' Compensation Act which provides *inter alia* as follows (Title 33 U. S. C. A. Section 905):—"The liability of an employer prescribed in section 904 of this chapter shall be exclusive . . ."

There are exempted from the provision of the Longshoremen's Act any "master or member of a crew". In

construing this provision, this Court has ruled that the important factor is the character of the work undertaken. It has expressly found that the fact that an employee was carried on the ship's roster as a "seaman" does not make him one and does not prevent the application of the Longshoremen's Act as the exclusive remedy.

> *South Chicago Coal & Dock Co. v. Bassett,* 309 U. S. 251 (1940).

This Honorable Court has denied *certiorari* in the cases of employees aboard barges on navigable waters, where such barges were without helm or means of propulsion. Circuit Courts have repeatedly held that such an employee is a mere caretaker who happens to be on the water, but whose duties are primarily local in character and subject to exclusive remedy under the Longshoremen's Act.

> *De Wald v. B. & O. RR. Co.,* 71 Federal 2d, 810 (C. C. A. 4th, certiorari denied 293 U. S. 581).
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> *Diomede v. Lowe,* 87 Federal 2d, 296 (C. C. A. 2d, certiorari denied 301 U. S. 682).

(B) *The present disability was not incurred in the service of a ship.*

Respondent has every sympathy for the unfortunate condition of the libellant; there is no attempt here to deny or belittle his disability as it existed at the time of the trial. Neither is there much doubt that his condition then was the result of a progressive disease. There is evidence even that he had a throat huskiness prior to the commencement of employment in January, 1925.

The maritime doctrine of maintenance and cure arose first to protect seamen who were stranded in a foreign port. It was extended, as a matter of national policy, to recruit seamen by protecting them after the termination

of the voyage, regardless of whether there was neglect in the causation of the injury. The imposition of an impossible burden on vessel owners will have a contrary result.

We do not have here the ancient mariner who goes to sea, but only a harbor worker. The same considerations of policy do not apply, particularly since the amendment of the Longshoremen's and Harbor Workers' Compensation Act of 1927.

It has always been a primary obligation on any libellant, claiming maintenance and cure in admiralty, to show that the disability began during service on the ship. With respect to this libellant's condition of cancer, there is no possible medical evidence which can be produced which will do more than say that chronic irritation may be an unfavorable factor in the development of cancer. Accordingly, we do not have an illness at the termination of a voyage, or even an illness which came into existence during the voyage, we have only an illness which existed at time of trial and may have been germinating at the termination of the employment. It cannot be found that the libellant's disability occurred in the service of the ship, unless we apply "mere speculation or conjecture". This has been expressly held to be insufficient.

Miller v. Lykes Bros.-Ripley SS. Co., Inc., 98 Fed. 2d, 185 (5 C. C. A. 1938).

(C) *The libellant was subsequently similarly employed by others on two occasions for a total of about twenty-nine months.*

The ability to return to work under the prevailing circumstances is clear evidence that the libellant had received the "care" to which he was entitled. In addition, any public policy which makes an employer a guarantor of public health insurance is satisfied by recovery of ability to be re-employed.

If the within liability for maintenance and cure arose out of neglect, it would not be so clear that the liability

should be terminated by subsequent employment. Liability herein has been imposed because of the mere co-existence of disability and termination of employment. The District Court was affirmed by the Circuit Court in its statement that "It must be stressed that libellant's right to maintenance and cure is premised solely on the unquestioned illness and the attending disability which existed at the termination of his employment with the respondent, and is completely independent of, and unrelated to, any events prior to that time". (Record page 113.)

The reasoning whereby liability is imposed on the respondent vessel owner merely because it is an employer, would seem equally applicable to impose liability upon either the Reading Company or the S. C. Loveland Co. Where there is no causation and no negligence there is no logic or necessity in placing liability on the employer furthest removed. Rather it would seem the employer who worked the man to exhaustion should be the insurer, if there is any policy to support this imposition.

In *The Ball Brothers,* 35 Fed. 2d, 261 (1935), a seaman was denied maintenance and cure for disabilities attributed to an accident during employment when it appeared that he had worked on other vessels after the accident for a period of about three years.

(D) *The liability of the respondent as a vessel owner for maintenance and cure does not continue indefinitely.*

This Honorable Court expressed itself originally on the subject of maintenance and cure in *The Osceola,* 189 U. S. 158, the subject being recently developed in *Calmar SS. Co. v. Taylor,* 303 U. S. 525. While the facts here are essentially different and advanced, this does not justify the radical departure from the basic principles of the decided cases.

This Court did declare in *Calmar v. Taylor* on page 530 that "We can find no basis for saying that, if the disease proves to be incurable, the duty extends beyond a fair

time after the voyage in which to effect such improvement in the seaman's condition as reasonably may be expected to result from nursing, care and medical treatment".

It is respectfully submitted that this is a crystal clear statement that maintenance and cure does not continue beyond the point where medical treatment would be beneficial, even where the disability is incurable. The Circuit Court majority opinion sets forth agreement that payment shall be only for a reasonable time after termination of employment but concludes without citation of authority that a reasonable time is nothing less than a lifetime. The majority further held that the right may not be extinguished by a recovery after "care" if there is any subsequent relapse.

It is not necessary to make the practical argument that any such liability makes of every vessel owner an insurer for life of the health of his employees. The decided cases do not begin to support the liability imposed herein.

In *Chelentis v. Luckenbach SS. Co., Inc.,* 247 U. S. 372, 379 (1917), the court stated "a seaman . . . could recover . . . only wages to the end of the voyage and the expenses for maintenance and cure for a reasonable time thereafter".

In *The Bouker No. 2,* 241 Fed. 831, 835 (C. C. A. 2d, 1917), this language was used in denying the claim: "We hold that . . . the duty of the ship and owner persists for a reasonable time after the termination of voyage and wage relation. Of course it must begin before such termination".

In *Lindgren v. Shepard SS. Co.,* 108 Fed. 2d, 806 (C. C. A. 2d, 1940), there was an incurable progressive disease which admittedly disclosed itself during a last voyage at sea. Quoting the decision of this Honorable Court in *Calmar v. Taylor,* the Circuit Court of Appeals for the Second Circuit concluded that the employer was not expected to furnish medical service beyond the time when the seaman was cured as completely as possible (page 808):

"In Reed v. Canfield, Fed. Cas. No. 11,641, C. C. Mass., Mr. Justice Story remarked (20 Fed. Cas. 426, at p. 429, No. 11,641): 'The sickness or other injury may occasion a temporary or permanent disability; but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability' ".

(E) *Suit was not brought within six years of termination of employment.*

The District Court found that the defense of the respondent was prejudiced by the lapse of time in bringing suit. The witnesses of the respondent were understandably vague, records were not available, and the Barge "O-1" was sold in 1935. The District Court applied by analogy the Statute of Limitations of six years in contracts but only to the amount of recovery. The Circuit Court removed the limitation even to this extent, holding in effect that there could be no prejudice so long as the one fact of illness at the termination of the voyage was admitted.

It is recognized that the application of the Statute of Limitations in maritime matters is one of discretion with the court. However, the Circuit Court has not stricken the limitation of the District Court of Appeals because of an abuse of discretion, but because of its own finding that the bare fact of illness was solely important, and could not be supplemented or minimized or explained away so far as liability was concerned.

It is respectfully submitted that the existence of illness is not the only question of fact involved and that failure to bring suit in due course does prejudice necessarily the preparation of defense. The facts with respect to the appearance of the illness prior or during employment, the extent of its existence at termination of employment, and the manner of its treatment and recovery are material factors in the determination of the liability.

In proof of each of these respects, the respondent has undeniably been prejudiced. The comment of Judge Kalodner in connection with the claim for indemnity is equally pertinent here:—"The presumption of prejudice which may be regarded as arising from such extended delay has not satisfactorily been rebutted. . . . Considering all the circumstances in this case, it is the opinion of this Court that the delay has been not only inexcusably undue but also prejudicial to respondent". (Record p. 109.)

There will be no question but that Admiralty Courts have applied the statute of limitations by analogy to bar the prosecution of claims both for indemnity and for maintenance and cure.

Stampalia v. Murphy, 34 Fed. 2nd 660 (D. C. Pa. 1929).

VII. CONCLUSION.

From the foregoing it appears that the Circuit Court of Appeals for the Third Circuit has rendered a decision in conflict with the decisions of other Circuit Courts in that it has found the libellant to be a seaman rather than a harbor worker under the exclusive jurisdiction of the Longshoremen's and Harbor Workers' Compensation Act of 1927. It has decided important questions of Federal law which should be settled by this Court, continuing liability for maintenance and cure after subsequent similar employment and after a reasonable time to effect a cure, where the suit was brought more than six years after the termination of the employment. It is respectfully submitted further that its decision is properly in conflict with the applicable decisions of this Court in that it has imposed an obligation to furnish for life maintenance and cure to the caretaker of a supply barge.

It is earnestly urged that the petition be granted.

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